August 24, 2023

VIA ELECTRONIC SUBMISSION

Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE, Washington, DC 20549-1090

Re: Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N–PORT Reporting, File No. S7–26–22. Release Nos. 33–11130; IC–34746

Dear Ms. Countryman:

The American Council of Life Insurers and the Committee of Annuity Insurers (together "we," "our," or "us") are supplementing our joint comment letter dated February 14, 2023,[1] which responded to the request for public comment by the Securities and Exchange Commission (the "SEC" or "Commission") on the proposed rulemaking titled "Open-End Fund Liquidity Risk Management Programs and Swing Pricing; Form N–PORT Reporting" (the "Release").[2]

Our members continue to be firmly opposed to the swing pricing-hard close proposal set forth in the Release and, for all the reasons set forth in our February 2023 joint comment letter, believe that the proposed swing pricing-hard close framework should be abandoned. We are submitting this supplemental comment letter in light of the Commission's recently adopted amendments to Rule 2a-7 under the Investment Company Act of 1940 (the "1940 Act"), which establish a mandatory liquidity fee framework for certain money market mutual funds instead of the swing pricing framework that the Commission had originally proposed.[3] Insofar as the SEC may be considering new rules that would implement a mandatory liquidity fee framework in lieu of the swing pricing framework that the Commission proposed in the Release, we urge the Commission to consider the following comments.

Any new rules implementing a mandatory liquidity fee framework for mutual funds should be proposed by the SEC with opportunity for public comment. Proceeding directly to a final rulemaking would be neither within the SEC's legal authority nor in the public's best interest. Mandatory liquidity fees could be extremely problematic, especially for variable insurance contracts and retirement plans, raising significant issues related to contractual rights and obligations, other applicable law, operations, and investor experience. Public comment on a detailed proposal is critical in order to analyze the workability of any such framework, to bring important issues to the SEC's attention, and to minimize harm to investors and undue burden for insurance companies.

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[1] *See* Patrick Reeder, Vice President & Deputy General Counsel, and James H. Szostek, Vice President & Deputy, Retirement Security, American Council of Life Insurers, and Stephen E. Roth, Esq., Partner, and Ronald Coenen Jr., Esq., Partner, Eversheds Sutherland (US) LLP on behalf of the Committee of Annuity Insurers ("February 2023 Comment Letter"), available at https://www.sec.gov/comments/s7-26-22/s72622-20157259-325508.pdf.

[2] 87 FR 77172.

[3] *See* Money Market Fund Reforms; Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A. Release Nos. 33–11211; 34–97876; IA–6344; IC–34959 (Aug. 3, 2023).

The Release did not provide adequate notice and opportunity for public comment on any new rules related to liquidity fees. While the Release included liquidity fees as a potential regulatory alternative to swing pricing, it did not contain the text for any liquidity fee rules or provide a basis for meaningful public comment. The Release was vague as to how a mandatory liquidity fee framework would work, stating that there are "many potential variations of a liquidity fee framework" and (over only a few pages) sketching out some wide-ranging possibilities. For example, according to the Release:

- Liquidity fees could apply to purchasing investors, redeeming investors, or both;
- They could be triggered by net flows or other indicators related to trading costs;
- They could be either dynamic or relatively static in size;
- They may or may not differ for purchasing and redeeming investors;
- They could be applied directly to fund orders or processed separately on a delayed basis;
- They may or may not require hard close or a related alternative; and
- The SEC may or may not require intermediaries to submit purchase and redemption orders separately.[4]

Given the absence of any substantive detail regarding liquidity fees, that portion of the Release could not reasonably be treated as a formal rulemaking proposal. Indeed, the Commission stated in the Release that "as an alternative to the proposed swing pricing requirement, we *could* have proposed to require funds to charge liquidity fees to transacting investors."[5] As such, it seems clear that the Release did not lay sufficient groundwork for proceeding to a final rulemaking on mandatory liquidity fees.

Administrative law issues aside, if the SEC is to move forward with mandatory liquidity fees in some fashion, it is critically important that the public be given an opportunity to analyze and comment on a concrete proposal. As evidenced by the overwhelming public response to swing pricing-hard close, any fundamental transformation in mutual fund liquidity risk management will raise complex issues and affect numerous interested parties. It is practically impossible for the SEC to consider all significant pitfalls and potential harms without the benefit of public comment. Of course, our comments would primarily focus on variable insurance contracts, as well as retirement plans, and we do expect that a mandatory liquidity fee framework would raise serious, perhaps insurmountable, concerns.

Mandatory liquidity fees for mutual funds should not be viewed as a mere extension of existing regulation under the 1940 Act. While the existing 1940 Act regulatory scheme does contemplate liquidity fees in a limited manner, a mandatory liquidity fee framework would be unprecedented. Its scope and scale could be overwhelming and unworkable, and the burdens and harms could far outweigh any benefit. This is especially true for variable insurance contracts. Depending on the design of any new framework, insurance companies may be faced with underlying funds often imposing liquidity fees, perhaps even every business day. That could raise severe problems and numerous questions from a contractual, legal, and operational perspective. We expect that some would be similar to the intractable problems we raised in response to the proposed swing pricing-hard close framework. And we expect that some would be entirely novel, calling for our unique expertise and careful analysis.[6] In any event, if the SEC is to proffer new liquidity fee rules, given the complexity and importance of the subject matter,

[4] 87 FR 77172, pp. 215-217.

[5] 87 FR 77172, p. 268 (emphasis added).

[6] Furthermore, insofar as certain issues have been raised with the SEC in prior rulemakings related to the imposition of liquidity fees, such issues were never fully resolved or addressed.

the public would be best served by giving us and others a meaningful opportunity to comment in response to a detailed proposal.

We appreciate the opportunity to submit this supplemental comment letter and thank the Commission for considering our views.

Respectfully submitted,

AMERICAN COUNCIL OF LIFE INSURERS

Patrick C. Reeder

Patrick C. Reeder
Vice President & Deputy General Counsel
(202) 624-2195
patrickreeder@acli.com

Jennifer M. McAdam

Jennifer M. McAdam
Associate General Counsel
(202) 624-2032
jennifermcadam@acli.com

COMMITTEE OF ANNUITY INSURERS
For the Committee of Annuity Insurers, By:

Stephen E. Roth

Stephen E. Roth, Esq.
Partner, Eversheds Sutherland (US) LLP
(202) 383-0158
SteveRoth@eversheds-sutherland.us

Ronald Coenen Jr.

Ronald Coenen Jr., Esq.
Partner, Eversheds Sutherland (US) LLP
(202) 383-0940
RonCoenen@eversheds-sutherland.us

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime Lizárraga, Commissioner
Mr. William A. Birdthistle, Director, Division of Investment Management